Filed 2/4/13 Simons v. Stewart CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

IRVING E. SIMONS et al., Plaintiffs and Appellants, v. CHARLES E. STEWART et al., Defendants and Respondents.	B238681 (Los Angeles County Super. Ct. No. SC110104)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed.

Jenifer J. Anisman for Plaintiff and Appellant.

MacGregor & Berthel, Gregory Michael MacGregor, Deborah A. Berthel, R. Timothy O'Connor for Defendant and Respondent.

_____

Plaintiff Irving E. Simons (Simons) appeals the judgment entered following the successful demurrer of defendants Allstate Insurance Company (Allstate) and its agent, Charles E. Stewart (Stewart), to the second amended complaint. Simons sought to recover from Aetna under a homeowner's insurance policy (the Policy) issued to Alexa Greenberg[1] (Greenberg) when artwork owned by Simons (the Artwork) was damaged in transit by movers, and from Stewart for his misrepresentations concerning coverage under the Policy. The trial court sustained defendants' demurrer, ruling that Simons was not an insured under the policy and that the complaint alleged no actionable misrepresentation by Stewart, and entered judgment for defendants. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

For the 11 years preceding the loss at issue in this case, Simons and Greenberg (sometimes together referred to as the plaintiffs) resided together in a house owned by Greenberg. During that period, certain pieces of the Artwork were displayed in the residence while others were stored in the home and garage.

Stewart was Simons's longtime friend and insurance agent; he sold to one or both of the plaintiffs the homeowner's insurance on the residence (the Policy), as well as automobile insurance and an umbrella liability policy. Stewart was aware of Simons's art collection. As Simons explains in his brief on appeal, he "believed Stewart attended to all his insurance needs and that he was covered under the Policy."

At some point in time, the Artwork was transported from Los Angeles to St. Louis, Missouri for exhibition. In December 2008, while in transit back to Los Angeles, the Artwork sustained substantial damage. Simons contacted Stewart about making a claim on the Policy, and was told that the loss was not covered under the Policy. Stewart

---

[1] Greenberg, a plaintiff below, did not appeal the judgment.

[2] For purposes of our review, "we assume the truth of all well-pleaded facts and accept as true all facts that may be implied or inferred from the facts alleged." (*Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.* (2006) 140 Cal.App.4th 795, 798.)

belatedly forwarded a copy of the Policy to Simons, who after reading it concluded "that some of the damage may have been covered under the policy."

Simons filed suit against Allstate and Stewart, alleging causes of action for negligent and fraudulent misrepresentation and breach of the duty of good faith and fair dealing.

DISCUSSION

This case turns on the interpretation of the policy. The issue is one of law and our review is de novo. (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 18; *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779–780.)

The rules are well-established. In interpreting an insurance policy, we follow the general rules of contract interpretation. We give effect to the mutual intention of the parties, determined, if possible, from the written provisions of the contract. The clear and explicit meaning of those provisions, interpreted in their ordinary and popular sense, controls. (*Topanga and Victory Partners v. Toghia, supra,* 103 Cal.App.4th at pp. 779–780.) "[E]xclusionary clauses are interpreted narrowly, whereas clauses identifying coverage are interpreted broadly." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406.)

1. *Simons failed to state a claim for breach of the Policy*

Initially, we note that Greenberg was the only named insured under the Policy, and that Simons was not an "insured person," under any definition contained in the Policy.

The section of the Policy at issue here concerns "Coverage C – Personal Property Protection." That section reads as follows: "Property We Cover Under Coverage C: [¶] 1. Personal property owned or used by an insured person anywhere in the world. When personal property is located at a residence other than the residence premises, coverage is limited to 10% of Coverage C – Personal Property Protection. This limitation does not apply to personal property in a newly acquired principal residence for the 30 days immediately after you begin to move property there or to personal property in student

dormitory, fraternity or sorority housing. [¶] 2. At your option, personal property owned by a guest or residence employee while the property is in a residence you are occupying.'" Simons relies on the clauses "personal property owned or used by an insured person anywhere in the world" and "personal property owned by a guest or residence employee while the property is in a residence you are occupying" to argue that the Artwork is covered under the Policy.

However, under a section titled "Property We Do Not Cover Under Coverage C," the Policy excludes from coverage "Property of roomers, boarders, tenants not related to an insured person." Clearly, Simons was a tenant – an occupier of the real property of another – and not related to Greenberg, the only insured person under the Policy. Consequently, the Artwork was excluded from coverage under the plain terms of the contract. And in the absence of a contract, Simons cannot state a claim for breach of the duty of good faith and fair dealing which is an implied-in-law term of all contracts. (See, e.g., *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.)

2. *Simons failed to state a claim for negligent or intentional misrepresentation*

Simons also brought causes of action for negligent and fraudulent misrepresentations made by Stewart with respect to the Policy. Specifically, Simons alleged that Stewart represented that the damage to the Artwork was not a covered loss under the Policy.

"The elements of a cause of action for fraud and a cause of action for negligent misrepresentation are very similar. Pursuant to Civil Code section 1710,[3] both torts are defined as deceit. However, the state of mind requirements are different. 'Fraud is an intentional tort, the elements of which are (1) misrepresentation; (2) knowledge of falsity;

---

[3] "Civil Code section 1710 provides, in pertinent part, 'A deceit, . . . , is either: [¶] 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; [¶] 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; [¶] 3. The suppression of fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; . . .'"

(3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. [Citation.]' (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 200.) Negligent misrepresentation lacks the element of intent to deceive. Therefore, '"[w]here the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." [Citation.]' (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408, quoting 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 720, p. 819.)" (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 85-86.) Both negligent misrepresentation and fraud must be pled with specificity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.)

As we noted above, the Artwork was not a covered loss under the Policy. Consequently, Simons's causes of action for negligent and fraudulent misrepresentation must fail, as Stewart did not misrepresent the facts concerning insurance coverage for the Artwork. Rather, he told Simons that the Artwork was not covered, and he was right, the Artwork was not covered.

It seems that what Simons is really complaining about is that, as his friend and longtime insurance agent, he thought that Stewart would make sure that Simons's property was fully insured against risk of loss and damage. However, the complaint contains no allegation that Stewart promised to do so, and in the absence of a fiduciary relationship, he had no duty to do so. Longtime friendship does not a fiduciary relationship make. (*Schultz v. Steinberg* (1960) 182 Cal.App.2d 134, 138 ["'In the absence of a showing of the exercise of undue influence mere friendship does not constitute a confidential relationship.'"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.